

REEVES AMODIO LLC
ATTORNEYS AT LAW



Memorandum

To: Dan Sterchi
Adjacent Land Owner

From: Robert Reges
REEVES AMODIO LLC

Date: December 7, 2015

Subject: Drainage Encumbrances on Title
North 1/2 Government Lot 13, Section 30, Township 5 North
Range 11 West, Seward Meridian, Alaska

SUMMARY

The Kenai Peninsula Borough (**KPB**) seeks to modify, or allow others to modify, the drainage running through the North half of Government Lot 13, located within Section 30, Township Five North, Range Eleven West, Seward Meridian (**North ½ Lot 13 or This Parcel**).¹ This parcel lies between twelve mile Kalifornsky Beach Road (**K-Beach Rd.**) and Cook Inlet. To the best of undersigned counsel's knowledge, KPB has not secured permission or approval for the proposed modifications from either the State of Alaska or the United States. Both approvals must be obtained before any change can be made to this particular drainage. That is because the patent by which KPB acquired this Parcel was encumbered with a State of Alaska Navigation and Access Easement while the patent by which the State of Alaska acquired this

¹ This Parcel, N1/2 L13, Sec. 30, T5N, R11W, SM, is Tax Parcel #05536019 and is shown, albeit not clearly, on Kenai Plat No. 79-128 and the modification thereof, Kenai Plat No. 81-11. Copy of the latter is appended with the parcel high-lighted.

Parcel was encumbered with a drainage ditch right-of-way. The State and Federal Governments therefore hold property rights that cannot be divested without certain procedures and which must be honored before any modification is lawful.

I. The State of Alaska Navigation and Access Easement

In 1979, the State patented this Parcel (and other properties) to the KPB through a municipal land entitlement program then codified as Alaska Statute (AS) 29.18. The reference to that statutory program is shown on the face of Patent No. 4500, copy of which is attached, with the reference to statute highlighted.

Because the N ½ of Lot 13 borders Cook Inlet, this Parcel had to be encumbered with a public access easement. Before State could convey this Parcel to KPB, State had to “provide for the specific easements or rights-of-way necessary to ensure free access to and along the body of water, unless the commissioner finds that regulating or limiting access is necessary for other beneficial uses or public purposes.” AS 38.05.127(a)(2). Reference to this “access” requirement and to AS 38.05.127 is also shown on the face of Patent No. 4500.

Did the State provide access through this Parcel or did the State find that limiting access was necessary? There is nothing in the record to indicate that State limited access. Rather, a drawing appended to the State’s Patent is now recorded as KPB Plat 79-128. It is entitled “Municipal Land Nominations/Selections - Determination of Easements to and Along Waterbodies.” Although the recorded copy is hard to read, even when magnified online, it appears to designate the entire N1/2 of Lot 13 as a public access easement. This must be checked and confirmed or refuted with Alaska’s Department of Natural Resources (DNR) but all indications are that this Parcel is encumbered with a public access to navigable waters easement.

Because the Patent was made through AS 29.18, the municipal land entitlement program, KPB does not have authority to vacate, release, modify or relocate the easement. Only DNR has such authority. *See*, AS 38.05.127(d). The Borough may “apply” to DNR seeking such relocation of the easement. DNR may allow that relocation only “if the commissioner determines the action is consistent with the public interest.” *Id.* This means DNR must pursue a “best interest finding” before DNR can relocate or vacate the public access easement now encumbering title to the N ½ of Lot 13.

In sum, absent written findings from DNR, the Borough cannot undertake any modification of this parcel and it cannot sell or give away the parcel free from this encumbrance because the encumbrance, arising from patent, runs with the land.

III. The Federal Ditch Right of Way

The Federal Government had conveyed all of Lot 13 to the State by Federal Patent No. 50-65-0492. That patent issued March 16, 1965.² The patent expressly reserved to the United States Government “a right-of-way thereon for ditches ... constructed by the authority of the United States.” Copy of the patent is appended with that language highlighted.

By March 1965 there was a ditch and drainage system existing on the N1/2 of Lot 13. This is shown by two pieces of evidence. First, aerial photographs from 1963 and 1968 have been ordered from Quantum Spatial. They show some work in 1963 and an enlarged ditch by 1968. They will be provided as soon as they are produced by the vendor. Second, in 1966 the State “replatted” Lot 13. That replat, designated State Survey K-1631, shows a line running from K-Beach road to Cook Inlet, terminating in a “corrugated metal pipe.” Copy of that survey is appended, both in full and with N ½ of Lot 13 enlarged, with the referenced pipe highlighted in yellow.

Like many of the older recorded documents, Survey K-1631 is hard to read, even when enlarged on the computer. Accordingly, part of the State of Alaska’s analysis relative to the public access easement must necessarily include an analysis of this federally reserved ditch. In any event, KPB cannot dig in the ditch or replace the ditch because KPB received from the State no greater right than the State received from the Federal Government. All successors to the Federal Government have to acknowledge and work with federal ditch rights. Reserved to, and held by, the United States.

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² Note that later, in 1979, the State only gave KPB the North ½ of Lot 13. The State retained ownership of the South ½. A review of historic records suggests that the reason was because the South ½ had come to be occupied and developed by a citizen. Whatever the reason, KPB does not own the South ½ of Lot 13.

IV. Conclusion

KPB does not have clear title to the N ½ of Lot 13. Said title appears to be encumbered with a public access easement that can be modified only by DNR and a federally reserved drainage right-of-way that can be modified only with approval and permission of the United States. This is not an unusual situation. Many federal grants came with reservations; many state grants came with explicit and implied encumbrances. However, until these matters are addressed, KPB would be acting beyond the scope of its legal authority if it unilaterally altered to the N ½ of Lot 13.

END

NOTES

- 1. This map is prepared in accordance with the provisions of the Alabama Land Surveying Act of 1901, as amended, and the rules and regulations of the Alabama Surveying Board.
- 2. The owner of the land shown on this map is James M. Cook, Jr., and the land is being surveyed for the purpose of subdividing the same into lots for sale.
- 3. The boundaries shown on this map are based on a survey conducted by James M. Cook, Jr., on or about the 15th day of August, 1981, and the same are shown to conform with the plat of the same filed for record in the public records of the county of Baldwin, Alabama, on or about the 15th day of August, 1981.
- 4. The area of water shown on this map is shown to conform with the plat of the same filed for record in the public records of the county of Baldwin, Alabama, on or about the 15th day of August, 1981.

Map A

DATE OF PREPARATION: 8/15/81

DATE OF SURVEY: 8/15/81

BY: JAMES M. COOK, JR.

REGISTERED PROFESSIONAL SURVEYOR

NO. 210

STATE OF ALABAMA

COUNTY OF BALDWIN

SECTION 11

TOWNSHIP 11N

RANGE 11W

SECTION 11

SECTION 11

SECTION 11

SECTION 11

SECTION 11

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LEGEND

- COMPARISON / SECTION BOUNDARY
- WATER BODY BOUNDARY
- STREAM
- RAILROAD
- ALLEYS AND TRAILS
- TRACT / LOT BOUNDARY
- FENCE
- POWER TRANSMISSION LINE
- ROAD
- SPUR ROAD
- SPUR ROAD

SURVEYOR'S CERTIFICATE

I hereby certify that the survey shown on this map was made by me or under my supervision and that the same is correct and true to the best of my knowledge and belief.

DATE: 8/15/81

JAMES M. COOK, JR.



31-11

Map A

Map A

DATE OF PREPARATION: 8/15/81

DATE OF SURVEY: 8/15/81

BY: JAMES M. COOK, JR.

REGISTERED PROFESSIONAL SURVEYOR

NO. 210

STATE OF ALABAMA

COUNTY OF BALDWIN

SECTION 11

TOWNSHIP 11N

RANGE 11W

SECTION 11

THIS MAP WAS PREPARED FROM A SURVEY MADE AND FILED ON RECORD IN THE PUBLIC RECORDS OF THE COUNTY OF BALDWIN, ALABAMA, ON OR ABOUT THE 15TH DAY OF AUGUST, 1981.



AMENDED MAP

DATE OF PREPARATION: 8/15/81

DATE OF SURVEY: 8/15/81

BY: JAMES M. COOK, JR.

REGISTERED PROFESSIONAL SURVEYOR

NO. 210

STATE OF ALABAMA

COUNTY OF BALDWIN

SECTION 11

TOWNSHIP 11N

RANGE 11W

SECTION 11

Kenai Plat 81-11 (1981)

149 898

State of Alaska

Patent

No. 4500

Know All Men By These Presents that the State of Alaska, in consideration of the sum of TEN AND NO/100 ----- DOLLARS

lawful money of the United States, and other good and valuable considerations, now paid, the receipt whereof is hereby acknowledged, does hereby grant to -----

KENAI PENINSULA BOROUGH

P. O. Box 850, Soldotna, Alaska 99669 and to

their ^{successors} ~~heirs and assigns~~, all that real property situated in the Borough of Kenai Peninsula, State of Alaska, and described as follows:

TOWNSHIP 5 NORTH, RANGE 11 WEST, SEWARD MERIDIAN

SECTION 30: LOTS 6, 7, 8, 11, 12, 15, N½ OF LOT 13, S½ OF LOT 14

CONTAINING 26.89 ACRES, MORE OR LESS.

Subject to oil and gas lease, BLM Serial No. A-028056.

Subject to right-of-way, BLM Serial No. A-054094, issued to the Department of Highways for Kalifonsky Beach Road 200 feet in width.

Subject to valid existing trails, roads and easements.

Subject to A.S. 38.05.127, Access to Navigable or Public Waters.

Net chargeable acreage under A.S. 29.18.201 is 25.13 acres.

State Patent No. 4500 (1979)

149

899

008313

-7cc

FILED

Nov 5 12 30 PM '79

KPB

Township 5 North Range 11 West Seward Meridian

Alaska, according to the official survey thereof numbered _____ :

Save And Except those restrictions appearing in the Federal Patent or other conveyance by which the Grantor acquired title;

And Further, Alaska, as Grantor, expressly reserves out of the grant hereby made, unto itself, its lessees, successors and assigns forever, all oils, gases, coal, ores, minerals, fissionable materials, and fossils of every name, kind or description, and which may be in or upon said lands above described, or any part thereof, and the right to explore the same for such oils, gases, coal, ores, minerals, fissionable materials and fossils; and it also hereby expressly saves and reserves out of the grant hereby made, unto itself, its lessees, successors and assigns forever, the right to enter by itself, its or their agents, attorneys, and servants upon said lands, or any part or parts thereof, at any and all times, for the purpose of opening, developing, drilling and working mines or wells on these or other lands, and taking out and removing therefrom all such oils, gases, coal, ores, minerals, fissionable materials and fossils; and to that end it further expressly reserves out of the grant hereby made, unto itself, its lessees, successors and assigns forever, the right by its or their agents, servants and attorneys at any and all times to erect, construct, maintain, and use all such buildings, machinery, roads, pipelines, powerlines, and railroads, sink such shafts, drill such wells, remove such soil, and to remain on said lands or any part thereof for the foregoing purposes, and to occupy as much of said lands as may be necessary or convenient for such purposes, hereby expressly reserving to itself, its lessees, successors and assigns, as aforesaid, generally all rights and power in, to and over said land, whether herein expressed or not, reasonably necessary or convenient to render beneficial and efficient the complete enjoyment of the property and rights hereby expressly reserved.

To Have And To Hold the said land, together with the tenements, hereditaments, and appurtenances thereunto appertaining, unto the said Grantee and ^{successors} ~~their~~ heirs and assigns forever.

In Testimony Whereof the State of Alaska has caused these presents to be executed by the Director of the Division of Lands, Department of Natural Resources, State of Alaska, this 11th day of October, A.D. 1979.

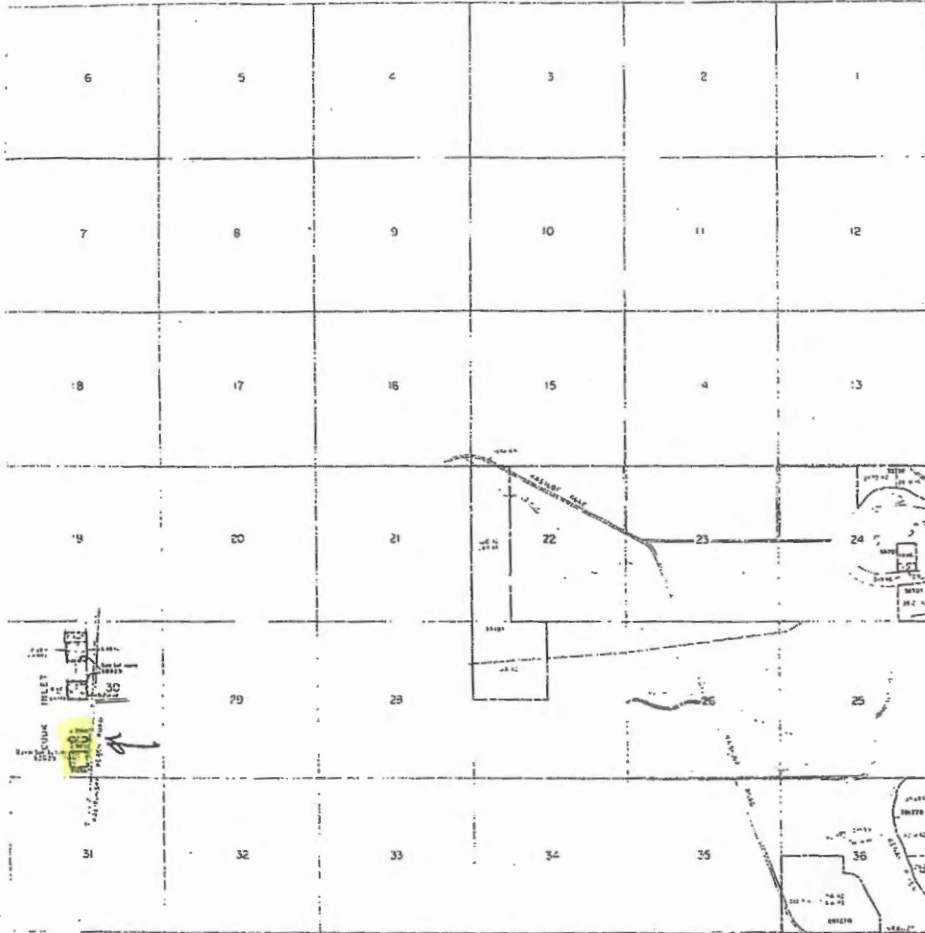
Theodore G. Smith
Director, Division of Forest, Land and Water Management

State of Alaska)
) ss.
THIRD)
) Judicial District)

This Is To Certify that on the 17th day of October, 1979, appeared before me

THEODORE G. SMITH, who is known to me to be the Director of the Division of Lands, Department of Natural Resources, State of Alaska, or the person who has been lawfully delegated the authority of said Director to execute the foregoing document; that he executed said document under such legal authority and with knowledge of its contents; and that such act was performed freely and voluntarily upon the premises and for the purposes stated therein.

MUNICIPAL LAND NOMINATIONS/SELECTIONS
ALASKA DIVISION OF LANDS No. 201278,50629,55707
 DETERMINATION OF EASEMENTS TO AND ALONG WATER BODIES, SHORELANDS
 ROADS AND TRAILS (IIAAC57) AND CONVEYANCE AREAS
 TOWNSHIP 5 NORTH, RANGE 11 WEST, SEWARD MERIDIAN, ALASKA



LEGEND

- NOMINATION/SELECTION BOUNDARY
- WATER BODY BOUNDARY
- SHORELINE
- EASEMENT
- TRAIL/ROAD BOUNDARY
- FENCE
- POWER LINE
- EASEMENT TO WATER BODIES

NOTES

- The above information was obtained from the records of the State of Alaska and is subject to the provisions of the Alaska Statutes.
- There have been no other nominations or selections made in this area since the date of this report.
- The water bodies shown herein were determined by the Alaska Division of Lands and are subject to the provisions of the Alaska Statutes.
- Other water bodies shown herein were determined by the Alaska Division of Lands and are subject to the provisions of the Alaska Statutes.

Map A
 DETERMINATION OF EASEMENTS TO AND ALONG WATER BODIES, SHORELANDS, ROADS AND TRAILS (IIAAC57) AND CONVEYANCE AREAS
 TOWNSHIP 5 NORTH, RANGE 11 WEST, SEWARD MERIDIAN, ALASKA
 DATE: 6/28/75
 BY: [Signature]
 CHECKED BY: [Signature]

SCALE 1" = 500'

| | |
|----------------------------------|-------------|
| DATE OF NOMINATION | 6/28/75 |
| DATE OF ALASKA DIVISION OF LANDS | 6/28/75 |
| Map A | |
| DATE | 6/28/75 |
| BY | [Signature] |
| CHECKED BY | [Signature] |

KPB Plat 79-128 (1979)
 • State's Designation of Access Easements

Anchorage 050604-C

The United States of America,

To all to whom these presents shall come, Greeting:

WHEREAS, a certificate of the Land Office at Anchorage, Alaska, is now deposited in the Bureau of Land Management, whereby it appears that pursuant to the grant of lands under Section 6(b) of the Act of Congress of July 7, 1958 (72 Stat. 339), as amended, the State of Alaska has selected the following described land:

Seward Meridian, Alaska.

T. 5 N., R. 11 W.,
Sec. 3, Lot 4;
Sec. 6, Lots 15, 16, 31, 33;
Sec. 19, Lots 8, 9, 13;
Sec. 30, Lots 7, 8, 9, 11, 12, 13, 14;
Sec. 31, Lot 3;
T. 4 N., R. 12 W.,
Sec. 1, Lot 2;
Sec. 12, Lots 12 and 13;
Sec. 13, Lot 12;
Sec. 24, Lots 3 and 11;
T. 6 N., R. 12 W.,
Sec. 3, Lots 4, 5, 6, 7, 9, 10, $E\frac{1}{2}NE\frac{1}{4}SE\frac{1}{4}NE\frac{1}{4}$;
Sec. 11, Lots 3 and 6;
Sec. 14, Lots 9 and 110;
Sec. 23, Lots 7, 16, 17, 69, 81;
Sec. 26, Lots 10, 15, $NE\frac{1}{4}NW\frac{1}{4}NE\frac{1}{4}$, $E\frac{1}{2}NE\frac{1}{4}SW\frac{1}{4}NE\frac{1}{4}$,
 $NE\frac{1}{4}SW\frac{1}{4}NE\frac{1}{4}SE\frac{1}{4}$.

The areas described aggregate 285.29 acres, according to the Official Plats of the Surveys of the said Lands, on file in the Bureau of Land Management:

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premisses, and in conformity with the said Act of Congress, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT, unto the said State of Alaska, and to its assigns, the tracts of Land above described; TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities and appurtenances, of whatsoever nature, therunto belonging, unto the said State of Alaska, and to its assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws and decisions of courts; and there is reserved from the lands hereby granted, a right-of-way thereon for ditches or canals constructed by the authority of the United States.

Patent Number **50-65-0492**

Anchorage 950604-C

There is also reserved to the United States a right-of-way for the construction of railroads, telegraph and telephone lines in accordance with the Act of March 12, 1914 (38 Stat. 305; 48 U.S.C. Sec. 305).

There are also reserved rights-of-way for a Federal Aid Highway and a material site under 23 U.S.C. 317.

Lot 3 said Sec. 11 is subject to the terms of an existing gravel permit, Anchorage 022511, pursuant to the Act of July 31, 1947 (61 Stat. 661; 30 U.S.C. 601-604).

Except that this patent shall not convey the oil and gas rights in the following lands until the oil and gas leases listed shall terminate or be relinquished, but upon such termination or relinquishment of the said leases, all the rights and interests to the oil and gas deposits in the said lands shall automatically vest in the patentee.

As to the following lands, this entry is made under Section 29 of the Act of February 25, 1920 (41 Stat. 437) and the Act of March 4, 1933 (47 Stat. 1570) and the patent is issued subject to the rights of prior permittees or leasees to use so much of the surface of the said lands as is required for mining operations for the duration of the leases and any authorized extensions thereof, without compensation to the patentee for damages resulting from proper mining operations.

| <u>Anchorage</u> <u>Serial No.</u> | <u>Land Description</u> |
|---------------------------------------|--|
| 028058 | T. 5 N., R. 11 W., S. M., Sec. 3, Lot 4; |
| 050112 | Sec. 6, Lots 15, 16, 31, 33; |
| 028140 | Sec. 19, Lots 8, 9, 13; |
| 028056 | Sec. 30, Lots 7, 8, 9, 11, 13, 14; |
| 028055 | Sec. 31, Lot 3; |
| 028143 | T. 4 N., R. 12 W., S. M., Sec. 1, Lot 2; Sec. 12, Lots 12 and 13; Sec. 13, Lot 12; Sec. 24, Lots 6 and 11. |

IN TESTIMONY WHEREOF, the undersigned authorized officer of the Bureau of Land Management, in accordance with the provisions of the Act of June 17, 1948 (62 Stat. 476), has, in the name of the United States, caused these letters to be made Patent, and the Seal of the Bureau to be hereunto affixed.

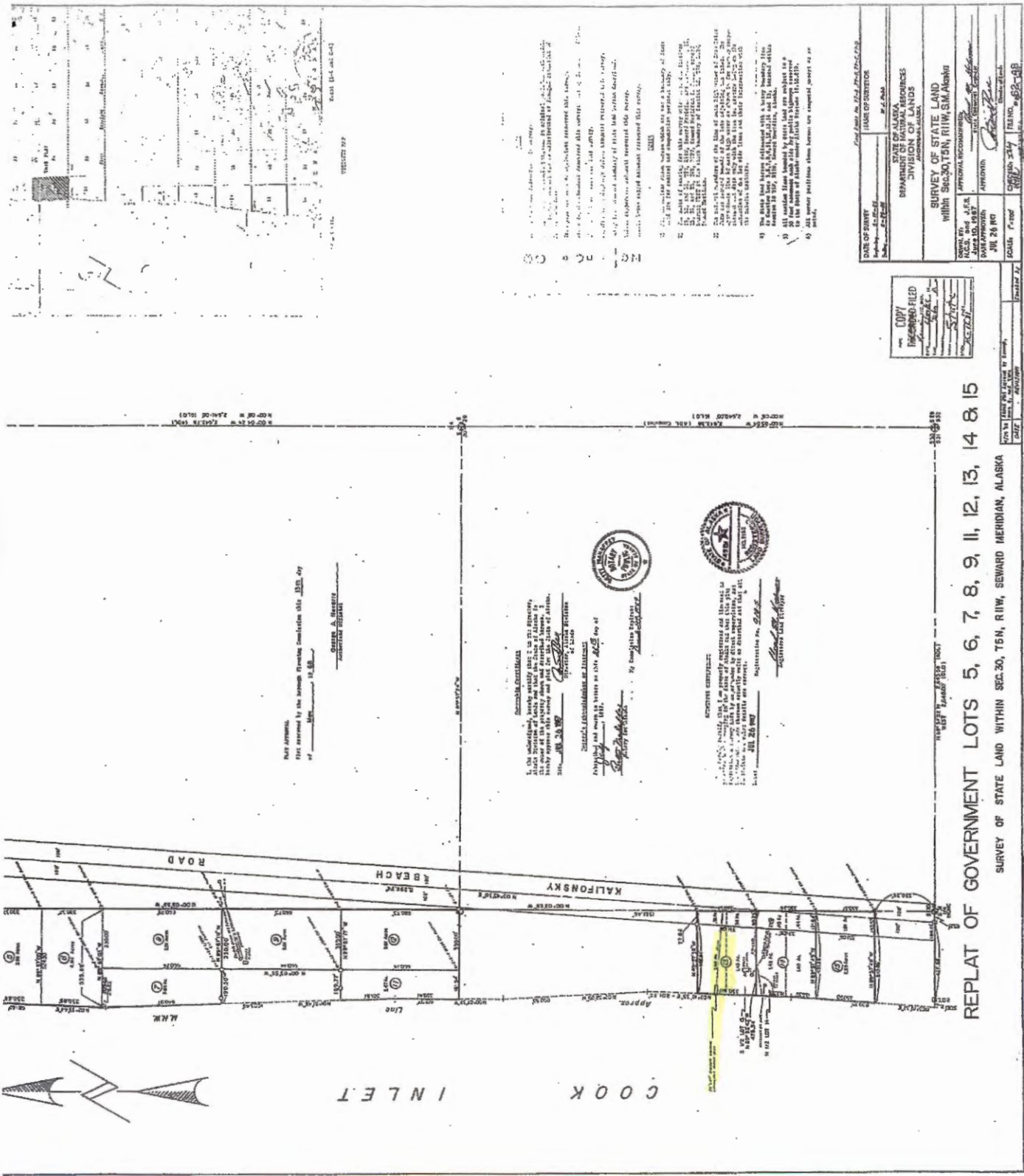
[SEAL]

GIVEN under my hand, in Anchorage, Alaska the
SIXTEENTH day of MARCH in the year of our Lord
one thousand nine hundred and SIXTY-FIVE and of the Inde-
pendence of the United States the one hundred and EIGHTY-NINTH.

By

Raymond A. Robinson
Alaska State Director

Patent Number **50-65-0492**



This survey is in accordance with the provisions of the Alaska Statutes, Chapter 38, Section 12.50, and Chapter 38, Section 12.51, and is subject to the provisions of the Alaska Statutes, Chapter 38, Section 12.52.

The survey was conducted by the Surveyor General of Alaska, and the results are shown on this map. The survey was completed on June 28, 1966.

The survey was conducted by the Surveyor General of Alaska, and the results are shown on this map. The survey was completed on June 28, 1966.

The survey was conducted by the Surveyor General of Alaska, and the results are shown on this map. The survey was completed on June 28, 1966.

REPLAT OF GOVERNMENT LOTS 5, 6, 7, 8, 9, 11, 12, 13, 14 & 15
 SURVEY OF STATE LAND WITHIN SEC. 30, T5N, R11W, SEWARD MERIDIAN, ALASKA

PREPARED BY: *[Signature]*
 DATE: *[Date]*

State Survey K-1631 (1966)

| | |
|---|---------------------------------------|
| DATE OF SURVEY JULY 28 1966 | NAME OF SURVEYOR J. J. [Signature] |
| REMARKS: THIS SURVEY WAS MADE IN ACCORDANCE WITH THE PROVISIONS OF THE ALASKA STATUTES, CHAPTER 38, SECTIONS 12.50, 12.51, AND 12.52. | |
| SURVEY OF STATE LAND WITHIN SEC. 30, T5N, R11W, S1M, ALASKA | |
| APPROVAL BY: JUL 28 1966 | APPROVED BY: <i>[Signature]</i> |
| DATE OF SURVEY JUL 28 1966 | NAME OF SURVEYOR J. J. [Signature] |

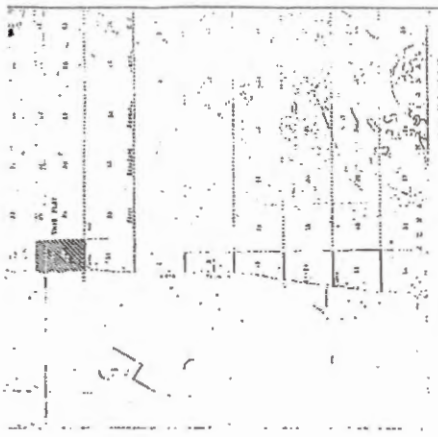
COPY
 RECORDED-FILED
 JUN 28 1966



I, the undersigned, being duly sworn, depose and say that the above is a true and correct copy of the original survey map as shown to me by the Surveyor General of Alaska, and that the same was prepared by him or under his direction and control.

Subscribed and sworn to before me on this 28th day of July, 1966, at the City of Anchorage, Alaska.

Notary Public for Alaska
[Signature]

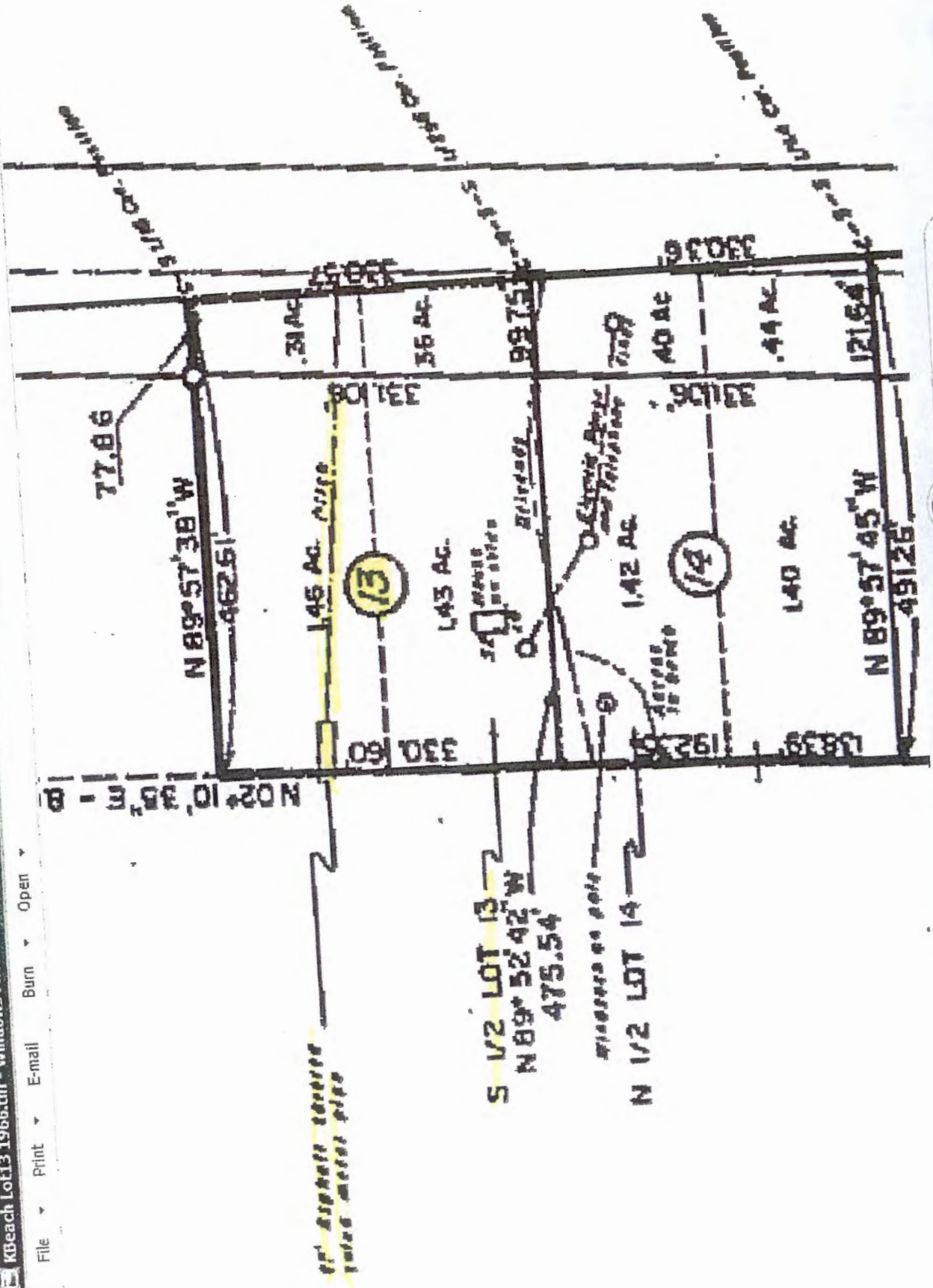


Scale: 1 inch = 1 mile

Enlargement: N 1/2 Lot 13, State Survey K-1631 (1966)

KBeach Lot13 1966.tiff - Windows Photo Viewer

File Print E-mail Burn Open



Navigation controls: X, Home, Back, Forward, Refresh, Zoom In, Zoom Out, Zoom Reset, Close.